ESPERANZA GRAZING ASSOCIATION

IBLA 99-259 Decided November 9, 2000

Appeal from a Letter/Decision of the New Mexico State Director, Bureau of Land Management, denying the protest of the grazing permittee to the decision to construct a fence excluding cattle from a riparian area of the allotment and declining to issue a proposed and final decision subject to appeal for a hearing pursuant to the regulations at 43 C.F.R. Subpart 4160. NM-020-FY-99-01.

Reversed to the extent BLM held the grazing adjudication regulations at 43 C.F.R. Subpart 4160 inapplicable; appeal referred to the Hearings Division.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings

   The relevant regulations governing grazing administration at 43 C.F.R. Subpart 4160 provide that proposed decisions shall be served on any permittee who is "affected" by the proposed actions, terms or conditions, or modifications relating to the permit. Any person whose interest is adversely affected by a final BLM decision under this part may appeal the decision for the purpose of a hearing before an administrative law judge. A decision denying a grazing permittee the right, pursuant to 43 C.F.R. Subpart 4160, to protest and appeal a BLM decision to construct fencing on a riparian pasture in an allotment to exclude livestock from a critical source of water on the ground the permittee was not affected by the decision is properly reversed and the case will be referred for a hearing.

APPEARANCES: Julia Mullen, Esq., Taos, New Mexico, for appellant; Ron Huntsinger, Manager, Taos Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal was filed on December 2, 1998, by the Esperanza Grazing Association (the Association) from a Letter/Decision of the New Mexico State Director, Bureau of Land Management (BLM), dated November 9, 1998,

rejecting its objections to the construction by BLM of riparian area fencing in the Lobo Canyon pasture of the Esperanza Grazing Allotment (No. 561) in New Mexico. The Association is the authorized grazing permittee of the 8,990-acre allotment, which contains approximately 6,612 acres of Federal land, as well as 1,899 acres of State land and 479 acres of private land. (Esperanza Allotment Management Plan (AMP) (January 1994) at 2.) The Association owns a 160-acre parcel of private land, which is situated within the allotment.

Appellant has Federal grazing permits authorizing livestock grazing use in the amount of 1,654 AUM's (animal unit months). Part of that use occurs in the Lobo Canyon Pasture of the allotment, which includes the water which flows through Lobo Canyon, known as the "Lobo Canyon drainage." Appellant's grazing use is rotated among four pastures (West, Big Ridge, Big Tank, and Lobo Canyon), with a fifth pasture (Hospital Pasture) used for sick animals and holding cattle prior to shipment.

The BLM fence building project at issue in this appeal was precipitated by a lawsuit which contended that BLM, among other things, violated provisions of the Endangered Species Act, 16 U.S.C. §§ 1531-1534 (1994), with respect to protection of the Southwestern Willow Flycatcher (Empidonax traillii extimus), a Federally-listed endangered bird species. Forest Guardians v. Chavez, No. 96-0693 JP/LCS (D. N.M.). In a settlement agreement resolving the Forest Guardians case, BLM agreed to place fences to exclude authorized livestock grazing use from the Rio Cebolla (including the Lobo Canyon drainage), in order to protect potential habitat of the Southwestern Willow Flycatcher. The settlement agreement, executed by Forest Guardians and BLM, 1/ and approved by the Federal district court on September 10, 1998, provided, in pertinent part, that BLM would "promptly proceed with and complete by May 1, 1999," fencing, so as to exclude authorized livestock grazing use from the Rio Cebolla (including the Lobo Canyon drainage). (Settlement Agreement at 5; see "Southwestern Willow Flycatcher Management Plan" (SWF Management Plan), dated March 11, 1998, at 15, Appendix A ("Rio Cebolla Long-term potential habitat" Map).)

Hence, the BLM Taos Field Office initiated action to construct a fence across Lobo Canyon. Taos BLM specifically proposed to construct a fence, within the allotment, along the south line of the SW¼SW¼ sec. 18, T. 26 N., R. 3 E., New Mexico Principal Meridian, Rio Arriba County, New Mexico. The fence would be located within the Chama Wilderness Study Area (WSA), which encompasses the southernmost portion of the allotment, and along part of the boundary between public land to the south and the Association's 160-acre parcel of private land to the north. The fence

1/ It does not appear that appellant as grazing permittee was a party to either the litigation or the settlement.

would be designed to exclude cattle from the drainage and, thus, protect and encourage the growth of riparian vegetation, which might otherwise be damaged by livestock grazing.

Taos BLM, along with representatives of the Association, inspected the proposed location of the fence on September 2, 1998, walking along the Lobo Canyon drainage from the head of Lobo Canyon to the confluence of that drainage and the Rio Cebolla. (BLM Memorandum to File, dated September 9, 1998.) This was apparently the only notice appellant had of the proposed fence.

Thereafter, on September 18, 1998, the Acting Field Office Manager, Taos BLM, relying on a three-page environmental assessment (EA) (No. NM- 020-98-33), issued a Decision Record/Finding of No Significant Impact (DR/FONSI), approving construction of the "Lobo Canyon Protection Fence." There is no evidence that the Association or any other member of the public was provided the opportunity to comment on a draft EA or a proposed DR/FONSI, prior to issuance of the EA and the DR/FONSI on September 18, 1998. Further, there is no evidence that BLM notified the grazing permittee of the allotment of either the EA or the DR/FONSI. In fact, other than the September 2, 1998, inspection, there is no indication that BLM involved the Association in its decisionmaking process at all.

The Lobo Canyon protection fence project principally involved constructing a fence across the canyon, along part of the south line of the SW¼SW¼ sec. 18. (EA at 1, 3.) However, it also included placing fencing along the east and west sides of the canyon in that vicinity, so as to ensure that no livestock grazing occurred in the canyon. Id. In approving the proposed action, the Acting Field Office Manager further provided that grazing would be excluded from the fenced riparian area for a period of 2 years, following which grazing would be permitted during each season for a limited amount of time (from 3 to 5 days) or until forage utilization reached a level of 40 percent, in the case of herbaceous species, and 10 percent, in the case of woody species. Id. at 2, 3.

Pursuant to an interdisciplinary review by BLM experts in various fields, BLM considered in the EA the environmental impacts of constructing the fence and alternatives thereto, which consisted of not constructing the fence (No Action) and not authorizing any grazing use on public lands in the allotment (Total Removal of Livestock). See "Environmental Assessment Checklist/Routing Page." Based on the EA, the Acting Field Office Manager concluded, in his FONSI, that BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to prepare an environmental impact statement (EIS), since no significant impact to the human environment was likely to result

from fence construction. Shortly after completion of the EA, Taos BLM commenced construction of the Lobo Canyon Protection Fence on September 18, 1998, completing the project on September 21, 1998, in advance of the onset of winter.

On September 25, 1998, the Association filed a memorandum, dated September 23, 1998, with BLM in which it objected to Taos BLM's decision to construct fences so as to preclude livestock access to the water in the bottom of Lobo Canyon. It indicated that, while it used the Lobo Canyon Pasture only about 1 month each year (except when drought dried up the "tank water" in the other three major pastures (West, Big Ridge, and Big Tank)), the drainage in that pasture provided a significant source of water for its authorized grazing use on BLM land in the allotment. (Memorandum at 2; Allotment Management Plan (AMP), dated January 21, 1994, at 2.) Thus, the Association stated that it regarded BLM's decision to fence the canyon a "taking" of private property without the payment of just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

The Association also questioned BLM's "hastily drawn" plan to fence the canyon, 2/ noting that there were "better ways to enhance the riparian area." (Memorandum at 3.) It also argued that the resulting improvement to that area, which would be "minimal," was not justified by the expense involved and the "stress" caused to relations between the Association and BLM. Id. at 2. The Association further challenged the failure of BLM to consider reasonable alternatives, including the alternative of pumping water from the canyon drainage up to both rims of the canyon, thus "help[ing] to substantially reduce" the need for livestock to enter the canyon for water. Id. Appellant also expressed doubt whether NEPA requirements were complied with in constructing the fence. Id. at 3. In addition, it questioned whether the fence construction comported with the nonimpairment requirements of section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994), for the protection of WSA's. Apparently unaware that the Acting Field Office Manager had already issued his September 1998 DR/FONSI, the Association also requested Taos BLM to issue a "formal" appealable decision regarding fence construction in Lobo Canyon. (Memorandum at 1; see Amended Memorandum, dated September 28, 1998, at 1.)

On November 9, 1998, the State Director issued a Letter/Decision. It stated that BLM would not issue a formal appealable decision regarding

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2/ The memorandum indicated that BLM officials at the Sept. 2 meeting on the ground disclosed that they "had orders from the BLM supervisors to fence higher elevation areas by December 1." (Memorandum at 1.)

fence construction in Lobo Canyon under the regulations at 43 C.F.R. Subpart 4160, calling for a proposed decision followed by a final decision. Noting that the regulation at 43 C.F.R. § 4160.1(a) provides that proposed decisions shall be served upon any grazing permittee who is affected by the proposed action relating to permits, the State Director held:

> The actual construction of the fence did not cause any reductions in Animal Unit Months (AUM's) and has been placed in an area which was deemed unsuitable for grazing in the 1981 Allotment Management Plan (AMP) * * *; [3/] therefore, there has been no "affect." Due to the no affect of the project, a decision document was not necessary prior to installation of the fence.

(Letter/Decision at 1.) The State Director also noted that the "majority" of the water in this area was still available, since cattle had not been excluded from grazing on private land in the canyon. Id. The State Director further stated that any future grazing use within the fenced area of the canyon would be considered when BLM undertook to decide whether to reissue the Association's grazing permits: "We expect that there would be an initial rest period of 2 to 4 years which may be followed by a fall/winter or early spring grazing season. Conservative utilization levels would be prescribed and closely monitored." Id.

While declining to issue a formal appealable decision, the State Director noted that Taos BLM had already issued its September 1998 DR/FONSI, authorizing the fence construction, a copy of which was enclosed with the decision. The State Director pointed out that a person adversely affected by that decision may appeal to the Board, pursuant to 43 C.F.R. § 4.410(a). (Letter/Decision at 2.) The State Director then proceeded to address each of the objections the Association had raised

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3/ The State Director quoted a provision of the 1981 AMP regarding suitability of the range for grazing which stated that, "[e]xcept for areas of precipitous terrain in Lobo Canyon and along the Rio Cebolla, the whole allotment is suitable for livestock grazing." (Letter/Decision at 7, quoting 1981 AMP at 3.) These areas, which were said to encompass 510 acres, included both the precipitous slopes of the canyon and the canyon bottom. (1981 AMP at 5; "Vegetation and Suitability" Map (Attachment 4 to BLM Motion to Dismiss).)

The November 1998 decision discloses that three different AMP's had been developed for the Esperanza Allotment in 1971, 1981, and 1994. (Dec. at 7.) The latter two are included in the record before us.

in its September 1998 Memorandum, concluding that it had not established any valid basis for overturning Taos BLM's decision to authorize the fence construction.

The State Director specifically concluded that the management of livestock grazing use on the public lands did not effect a "taking," under the Fifth Amendment to the U.S. Constitution. (Letter/Decision at 4-5.) He also indicated that Taos BLM had complied with section 102(2)(C) of NEPA. Id. at 7. The State Director recognized that pumping water from the Lobo Canyon drainage up to the canyon rim was a "viable means" to restore the riparian area in the canyon, by diverting grazing use, but noted that it had not yet been "thoroughly analyzed" and considered. Id. at 5. He also indicated that there was no violation of the nonimpairment requirements of section 603(c) of FLPMA, since the fence was considered a "grandfathered" use excepted from those requirements. Id. at 6.

The State Director further stated that the fence was necessary to allow restoration of the riparian area, which exhibited evidence of "heavy repeated [grazing] use during the growing season," despite the Association's statement regarding limited use. (Letter/Decision at 6.) He asserted that the fence would not be difficult to maintain, since there was evidence of only limited elk use in the area and the fence was constructed in a manner "proven to resist occasional high flows." Id. at 6. The State Director further held that the expenditure of funds was "minimal and prudent," especially given the "high" potential and need for improvement of the riparian area. Id. He also found that the decision to fence the canyon and thus allow the riparian area to recover was further supported by the need to restore and maintain the habitat of the Southwestern Willow Flycatcher in the Lobo Canyon drainage. Id. at 5 (citing 43 C.F.R. §§ 4180.1 and 4180.2(f)). Indeed, the State Director noted that the Field Office Manager had decided on April 15, 1998, in adopting the SWF Management Plan, to restore and maintain the "Rio Cebolla riparian complex," including the Lobo Canyon drainage. (Letter/Decision at 6; see DR/FONSI (SWF Management Plan), dated April 15, 1998.)

On November 20, 1998, the Taos Field Office Manager issued a proposed decision assigning maintenance responsibility for the Lobo Canyon Protection Fence to the Association, pursuant to 43 C.F.R. § 4120.3-1(c). It appears that appellant executed the relevant Cooperative Agreement as the BLM decision indicated that failure to sign the agreement could lead to cancellation of the grazing permit. In the context of appellant's pending challenge to the fencing decision, it is also apparent that it signed the agreement under protest.

The Association filed its notice of appeal with BLM on December 2, 1998, and the case was transmitted to the Board. In its statement of

reasons (SOR), appellant objects to BLM's decision to fence Lobo Canyon, arguing that, though its AUM's have remained constant, the decision has, in fact, injured its economic interests. In particular, appellant asserts economic losses from a reduction in forage and water available for cattle, costs of maintenance of a fence which is easily washed away, and diminution of the value of the base property. (SOR at 2.) Appellant also asserts that its constitutional rights to "procedural and substantive due process, equal protection, and just compensation for public taking of private property" have been violated. Id. And it further states that BLM has violated its "property rights in [F]ederal grazing permits, its vested usufruct[u]ary and ownership rights under the Treaty of Guadalupe-Hidalgo" and State law, and its rights to "forage, surface estate, and rights-of-way associated with [its] vested water rights." Id.

Because it has been "affected" by BLM's decision to fence the canyon, within the meaning of 43 C.F.R. § 4160.1(a), appellant contends that it is entitled, under 43 C.F.R. Subpart 4160, to a proposed/final decision and to take an "initial appeal to an administrative law judge." (SOR at 3.) It indicates that abiding by this process is necessary for the Department to address the various violations of its rights and the violations of certain Federal statutes, including NEPA. Id. at 3-4.

Appellant states that BLM specifically violated NEPA by not preparing an EIS, as required by the court in Forest Guardians and as rendered necessary by the likely significant impacts of fence construction and of that action in conjunction with other decisions concerning the allotment. (SOR at 4.) It also generally argues that BLM "failed [in its EA] to carefully review environmental problems or identify relevant environmental concerns." Id.

Appellant requests the Board to reverse BLM's decision to fence Lobo Canyon, order the removal of fences erected since September 10, 1998, and prohibit any further illegal fencing of the canyon. (SOR at 5.) Alternatively, it requests the Board to refer this case to an administrative law judge, pursuant to 43 C.F.R. § 4.470, for a hearing and decision regarding the propriety of BLM's decision to fence the canyon. (SOR at 5.)

On April 8, 1999, BLM filed a motion to dismiss the appeal in response to appellant's SOR. It recommends that the appeal be dismissed because appellant has failed to demonstrate that it has been adversely affected by BLM's decision to construct a fence in the Lobo Canyon drainage. In support of its motion, BLM first states that appellant's AUM's have not been reduced and property rights were not violated because the fence was constructed on public lands to protect riparian areas and no actions were taken on private property. (Motion to Dismiss at 2.) Further, BLM contends that there are no rights associated with a Federal

grazing permit and that the opportunity to graze is a privilege revocable at any time. Id. at 3. Additionally, citing the court-approved settlement in Forest Guardians v. Chavez, BLM argues that appellant was provided the full range of administrative remedies available to it. Id.

[1] The relevant regulations governing grazing administration at 43 C.F.R. Subpart 4160 provide that proposed decisions shall be served on any permittee who is "affected" by the proposed actions, terms or conditions, or modifications relating to the permit. 43 C.F.R. § 4160.1(a); 4/ see Joel Stamatakis, 98 IBLA 4, 7 (1987); Jones & Sandy Livestock, Inc., 75 IBLA 40, 42-43 (1983). A proposed decision shall set forth the reasons for the action and reference the relevant terms, conditions, and regulations. 43 C.F.R. § 4160.1(b). In the event of a timely protest, BLM shall reconsider its decision in light of the protest and shall issue a final decision. 43 C.F.R. § 4160.3(b). The relevant regulation further provides that any person whose interest is adversely affected by a final BLM decision under this part may appeal the decision for the purpose of a hearing before an administrative law judge. 43 C.F.R. § 4160.4; 43 C.F.R. § 4.470. The right of appeal to an administrative law judge for a hearing is grounded in section 9 of the Taylor Grazing Act dealing with grazing administration which directs the Secretary of the Interior to "provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer." 43 U.S.C. § 315h (1994). The right to a hearing on appeal from decisions of the authorized officer made in the administration of grazing districts has been recognized by the courts. William N. Brailsford, 140 IBLA 57, 59 (1997); Animal Protection Institute of America, 120 IBLA 342, 344 (1991); see LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir.), cert. denied, 376 U.S. 907 (1964); Joel Stamatakis, 98 IBLA at 7-8. Thus, the BLM assertion that there are no rights associated with a Federal grazing permit must be rejected.

The contention of BLM in its motion to dismiss that the settlement in Forest Guardians v. Chavez limits appellant's right to administrative review under the regulations, including a hearing, must similarly be denied. While BLM is a party to the litigation and settlement, appellant is not a party. Under these circumstances the doctrines of res judicata and collateral estoppel do not apply and appellant is not bound by the settlement. See United States v. Johnson, 39 IBLA 337, 344-45 (1979).

4/ Exceptions are recognized in which BLM may initially issue a final decision when a determination is made in accordance with the regulations at 43 C.F.R. § 4110.3-3(b) (grazing reductions when there is a finding of imminent likelihood of significant resource damage) or 43 C.F.R. § 4150.2(d) (closure of areas when BLM finds it necessary to abate unauthorized grazing). Neither of these exceptions applies in this case as neither of these findings was made by BLM.

Denial by BLM of appellant's right to a proposed decision regarding fence construction was based on the premise that the grazing permittee was not affected by the fence. This does not comport with the facts of record. It appears that appellant historically has had access to the excluded riparian area for a portion of the grazing season. This drainage is a significant source of water for appellant's permitted grazing use on BLM land, especially in dry seasons. Appellant states that it turns to the Lobo Canyon Pasture, because of that water source, when water is no longer available in its other pastures, and BLM reports heavy grazing use of the riparian area surrounding that source. (Memorandum at 2; Letter/ Decision at 5-6.) Appellant has asserted that BLM erred in failing to consider reasonable alternatives including the pumping of water from the canyon drainage to the canyon rim, thus reducing the need for livestock to enter the canyon drainage to obtain access to water. 5/ Thus, the absence of any reduction in the quantity of authorized grazing use (AUM's) does not negate the adverse affect on the grazier resulting from loss of access to water. Accordingly, the BLM Letter/Decision of November 9, 1998, denying appellant's right to administrative review pursuant to the regulations at 43 C.F.R. Subpart 4160 is reversed and the BLM motion to dismiss the appeal is denied.

Although BLM has denied appellant's entitlement to a proposed and final decision subject to appeal to an administrative law judge for a hearing, BLM has made its initial decision and effectively provided its response to appellant's September 1998 memorandum protesting the fence construction project in the BLM Letter/Decision of November 9, 1998, and the motion to dismiss the appeal. In these circumstances, remand of the case to BLM to issue a further decision would apparently be a pointless exercise. Accordingly, we find that the case is properly referred to the Hearings Division for a hearing before an administrative law judge. 43 C.F.R. § 4160.4; William N. Brailsford, 140 IBLA at 59; Joel Stamatakis, 98 IBLA at 7-8. Because the case concerns relatively few issues about management of a limited area, the parties may wish to consider recourse to the alternative dispute resolution procedures available through the Department.

5/ The BLM Letter/Decision of Nov. 9, 1998, did not reject this as an unreasonable alternative to restore the riparian area in the canyon. Rather, BLM conceded it had not yet been analyzed and considered.

We note, as does BLM, that appellant proposed, in a Mar. 1, 1999, submission to the State, that it would build a fence "to keep cattle out of the Lobo Canyon and its springs," in order to promote riparian vegetation. ("Proposal for Pollution Prevention for New Mexico's Unified Watershed Assessment Category I Watersheds" (Proposal) (Attachment 8 to BLM Motion to Dismiss) at 5; see BLM Answer at 3, 7.) However, it also proposed building a pipeline "to carry water short distances out of the springs." (Proposal at 6.) Thus, it appears that, from appellant's standpoint, construction of the fence is contingent on being otherwise able to obtain the canyon water when grazing on the allotment. See Memorandum at 2. This does not support a conclusion that appellant is unaffected by construction of the fence by BLM.

In reaching our decision, we make no finding on the merits of the BLM fencing decision. With respect to appellant's request to order removal of fences constructed since September 10, 1998, we find that this would be premature in the absence of an opportunity for a hearing on the merits before an administrative law judge. Regarding appellant's request for a prohibition of further fencing, we find, as we hold in this appeal, that any further construction would require issuance of a proposed and a final decision appealable pursuant to the regulations at 43 C.F.R. Subpart 4160. In the absence of such a proposed and final decision, entry of a stay would be inappropriate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the BLM decision that appellant is not entitled to a proposed and final decision subject to appeal for a hearing before an administrative law judge is reversed and the case is referred to the Hearings Division. The motion to dismiss the appeal is denied.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge